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No. 96-1596

In The

Supreme Court of the United States

October Term, 1996

STATE OF CALIFORNIA, et al.,

Petitioners,

v.

UNITED STATES, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* COUNTY OF SAN DIEGO IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

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INTEREST OF *AMICUS CURIAE* COUNTY OF SAN DIEGO

The underlying action brought by the State of California ("State") concerns the State's right to sue the United States over its failure to adequately protect the United States-Mexico border from illegal immigration. *Amicus curiae* County of San Diego ("County")[1] is situated on that border, and thus is the first point of entry for persons entering the United States illegally. This illegal immigration impacts the County financially. The County bears substantial direct costs resulting from arrest and incarceration of illegal aliens who commit crimes. The County also spends considerable amounts of its limited resources on providing emergency medical services for illegal aliens. The County therefore has a substantial interest in the State's argument relating to the Invasion Clause of the United States Constitution, art. IV, § 4. This brief will be limited to that issue only.

ARGUMENT

The Ninth Circuit Court of Appeals found that the State's Invasion Clause argument was deficient for two reasons. The court first found that the argument presented a nonjusticiable political question. App. A-11. In addition, the court rejected the State's argument that the Invasion Clause applied to illegal immigration, and instead held that the Clause was intended to apply only

[1] Pursuant to Sup.Ct.R. 37.4, the County is filing this brief without first filing a motion for leave to file an *amicus curiae* brief.

to situations involving foreign hostility or armed hostility from another political entity. App. A-13. As discussed below, the term "invasion" applies to mass illegal immigration across the United States-Mexico border. In addition, the Invasion Clause claim is justiciable.

1. The Invasion Clause applies to illegal immigration

The Ninth Circuit relied upon *The Federalist No. 43* (James Madison) in rejecting the State's argument that the Invasion Clause applied to illegal immigration. However, in interpreting the language of the Invasion Clause, the court should have first construed the term "invasion" in accordance with its ordinary or natural meaning. *F.D.I.C. v. Meyer*, 510 U.S. 471, ___, 127 L.Ed.2d 308, 317 (1994). After all, "[l]egislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." *Addison v. Holly Hill Fruit Prod., Inc.*, 322 U.S. 607, 618 (1944). The term "invasion" is not a technical term, and thus the court below should have determined the ordinary or natural meaning of "invasion" without resort to *The Federalist No. 43*.

Had the court below determined the ordinary or natural meaning of "invasion," it would have found that the definition has not changed since the passage of the Constitution. As the State notes in its Petition for Writ of *Certiorari*, the definition from Samuel Johnson's *Dictionary of the English Language* (1755) for "invasion" is "hostile

entrance upon the rights or possessions of another; hostile encroachment." State Petition at 17. The current definition of "invasion" in *Webster's Third New Int'l Dictionary* 1188 (1971) is "a hostile entrance or armed attack on the property or territory of another for conquest or plunder . . . an encroachment upon a right protected by law affording grounds for an action for damages or some other remedy."

In addition, it is appropriate for courts to compare definitions of ordinary words at the time of the passage of the Constitution with the current definitions of such words. *See Duckworth v. Franzen*, 780 F.2d 645, 651-52 (7th Cir. 1985), *cert. denied*, 470 U.S. 816 (1986).

Thus, the definition of "invasion" then and now is not limited to armed hostilities from other political entities. It is true that this is the gloss put on the term "invasion" by James Madison in *The Federalist No. 43*. However, as explained above, there is no need to resort to legislative history if the language of the provision in question is clear, and it is clear in this case. Moreover, James Madison's comments in *The Federalist No. 43* are entitled to little weight. *See Bath Iron Works Corp. v. Director, Office of Worker's Compensation*, 506 U.S. 153, 166 (1993) (no weight given to single reference by single Senator during Senate floor debate).

Finally, as the State notes in its Petition, the language of *The Federalist No. 43* relating to "invasion" is based upon a "latitude of expression" of the term. James Madison's discussion, while discussing "foreign hostility" and "ambitious or vindictive enterprises of more powerful

neighbors," does not preclude defining "invasion" to include other forms of hostile entrance or encroachment.

That an invasion has occurred cannot be questioned. *See* discussion below. As one commentator has observed:

> The federal government has exclusive control over immigration policy. Lax enforcement of federal laws that prohibit employment of illegal immigrants, coupled with an inability or unwillingness to police the borders effectively, has resulted in a massive influx of undocumented immigrants into the United States. An overwhelming percentage of these immigrants settle in just seven states. California alone accommodates a staggering forty percent of all illegal immigrants.
>
> This added population places heavy burdens on these states' resources. . . . [A]ccording to the GAO report, the net annual cost of illegal immigration to California is $1.25 billion.

Note, *Unenforced Boundaries: Illegal Immigration and the Limits of Judicial Federalism*, 108 Harv. L. Rev. 1643, 1644-46 (1995) (footnotes omitted).

Accordingly, the court below construed the term "invasion" too narrowly, and not consistent with the ordinary and natural meaning of that term.

2. The Invasion Clause claim is justiciable

The court below, relying upon *Baker v. Carr*, 369 U.S. 186 (1962), found the State's Invasion Clause claim to be a non-justiciable political question. App. A-11 to A-12. Specifically, the court below found that the Invasion

Clause implicated foreign policy concerns which had been constitutionally committed to the political branches. The court below also found that there were no manageable standards to ascertain whether or when an influx of illegal aliens would constitute an "invasion."

The court's reasoning involved the first two *Baker* "formulations" for determining whether a case was nonjusticiable because of a political question. *Baker* stated that "[p]rominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it . . . " *Baker*, 369 U.S. at 216.

The court below first found that the Invasion Clause implicates foreign policy concerns which have been constitutionally committed to political branches. It then stated that "[t]he Supreme Court has held that the political branches have plenary powers over immigration," citing *Fiallo v. Bell*, 430 U.S. 787 (1977). App. A-12. This, however, does not meet *Baker*'s formulation of a "*textually* demonstrable constitutional commitment of the issue to a coordinate political department." *Baker*, 430 U.S. at 416 (emphasis added). As *Baker* stated, the issue is "whether a matter has in any measure been committed *by the Constitution* to another branch of government. . . . " *Id.* at 211 (emphasis added). In this circumstance, the Constitution itself does not give plenary powers over immigration to the political branches. *Fiallo* simply noted that Supreme Court case law had found that Congress had plenary power over admission of aliens. *Fiallo*, 430 U.S. at 792.

The Constitution was nowhere mentioned in this discussion of plenary power, and the cases cited by *Fiallo* do not hold otherwise. *See Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (Supreme Court has sustained Congress's plenary power over aliens); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909) (Congress has plenary power over admission of aliens). *See also Chae Chan Ping v. United States*, 130 U.S. 581, 603 (1889) (ability to exclude aliens is an incident to every independent nation). There being no textual and direct commitment by the Constitution of immigration to the political branches, it follows that the first *Baker* formulation does not apply.

Nor does the second *Baker* formulation apply. That formulation requires the "lack of judicially discoverable and manageable standards for revolving [the issue]." *Baker*, 369 F.2d at 217. The court below defined the issue as "ascertain[ing] whether or when an influx of illegal immigrants should be said to constitute an invasion." App. A-12.

It is submitted that an invasion is like pornography: you know it when you see it. *See Jacobellis v. Ohio*, 376 U.S. 184, 197 (1964) (Stewart, J., concurring). In this case, the number of illegal immigrants in California increased from 1.441 million in October 1992 to 2 million in October 1996. 1995 Statistical Yearbook of the Immigration & Naturalization Serv., p. 183 (issued March 1997); 1994 Statistical Yearbook of the Immigration & Naturalization Serv., p. 179 (issued Feb. 1996). According to the Federation for American Immigration Reform, the United States Border Patrol reported that during fiscal year 1993, over 1 million illegal aliens were apprehended along the California-Mexico border, but that 2 million illegal aliens crossed the

border without being apprehended. Immigration and California, http://www.fairus.org/042ca702.htm.

In other words, the illegal alien population in California increased by 39 percent from 1992-96. And in fiscal year 1993, approximately 3 million illegal aliens attempted to enter California. This is clearly an "invasion" as that term is commonly understood to include a hostile encroachment.

CONCLUSION

For all of these reasons, this Court should grant the State's Petition for Writ of *Certiorari*.

Respectfully submitted,

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